



LEGAL FOUNDATIONS OF THE FORMATION OF MIXED LEGAL SYSTEMS: THEORY AND PRACTICE OF IMPLEMENTATION IN THE MODERN WORLD

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Contextualization: The study delves into the emergence and functionality of mixed legal systems, addressing their growing importance in the contemporary legal landscape. These systems, once neglected by scholars, now command substantial attention due to their unique characteristics and implications. By understanding the context in which mixed legal systems operate, this research aims to contribute to the broader discourse on legal diversity and globalization.

Objective: The primary objective of this study was to consider the features of mixed legal system formation, its features, and the practice of functioning in the modern world.

Methods: This study employs a multifaceted methodological approach to comprehensively investigate mixed legal systems. Drawing from dialectical analysis, historical examination, formal legal scrutiny, and comparative jurisprudence, the research explores the complexities of these systems.

Results: The study shows an increasing interest in mixed legal systems, their heterogeneity, and their classification based on different criteria. The authors discuss the advantages and disadvantages of mixed legal systems, emphasizing their interconnectedness and features of functioning. The authors conclude that further interpenetration of legal systems and legal families is possible in the future, which is largely related to legal globalization.

Keywords: legal system, mixed legal system, legal families, legal circles, sources of law, legal pluralism.





FUNDAMENTOS JURÍDICOS PARA A FORMAÇÃO DE SISTEMAS JURÍDICOS MISTOS: TEORIA E PRÁTICA DE IMPLEMENTAÇÃO NO MUNDO MODERNO

Contextualização: O estudo investiga a emergência e a funcionalidade dos sistemas jurídicos mistos, abordando a sua crescente importância no panorama jurídico contemporâneo. Estes sistemas, outrora negligenciados pelos estudiosos, merecem agora uma atenção substancial devido às suas características e implicações únicas. Ao compreender o contexto em que operam os sistemas jurídicos mistos, esta investigação pretende contribuir para o discurso mais amplo sobre a diversidade jurídica e a globalização.

Objetivo: O objetivo principal deste estudo foi considerar as características da formação de um sistema jurídico misto, suas características e a prática de funcionamento no mundo moderno.

Métodos: Este estudo emprega uma abordagem metodológica multifacetada para investigar de forma abrangente sistemas jurídicos mistos. Com base na análise dialética, no exame histórico, no escrutínio jurídico formal e na jurisprudência comparada, a pesquisa explora as complexidades desses sistemas.

Resultados: O estudo mostra um interesse crescente pelos sistemas jurídicos mistos, pela sua heterogeneidade e pela sua classificação com base em diferentes critérios. Os autores discutem as vantagens e desvantagens dos sistemas jurídicos mistos, enfatizando a sua interligação e características de funcionamento. Os autores concluem que é possível no futuro uma maior interpenetração dos sistemas jurídicos e das famílias jurídicas, o que está em grande parte relacionado com a globalização jurídica.

Palavras-chave: sistema jurídico, sistema jurídico misto, famílias jurídicas, meios jurídicos, fontes do direito, pluralismo jurídico.

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INTRODUCTION

The issue of mixed legal systems has been ignored by researchers of the theory of law and comparative jurisprudence for a long time. However, there has been a strong interest in this type of legal system for several decades now. The concept and the classification of mixed legal systems are being developed.

Currently, mixed legal systems are studied as the coexistence of two or even three legal systems within one or as elements of one legal system interspersed with another legal system. The former is associated with legal pluralism, based on which a significant number of modern mixed legal systems are built and due to which many countries have managed to avoid the negative consequences of the cardinal changes that took place during the transformation into independent states.

A topical issue is the identification of the concept, place, and role of states' legal systems in the modern world. Thus, the category of legal system still causes controversy in the scientific field related to its concept of this category and differentiation from related concepts, such as legal family and system of law.

The discussion continues about the classification of legal families and legal systems. Even though the classifications of legal families developed by the classics of comparative law, such as R. David (1964), R. Schlesinger (1959), and later K. Zweigert and H. Kötz (1969), are relatively recent, rapidly developing social relations require a more thorough consideration of this issue.

One such urgent issue in the theory of legal families and legal systems is the coexistence of elements of several legal families within the legal system of one state. Such systems are called mixed or pluralistic legal systems. Such coexistence, initially not seriously considered by the classics of comparative jurisprudence, has now firmly settled both in the theoretical doctrine of legal families and systems and is successfully implemented in many countries, gradually blurring the boundaries between established legal families and systems.





Thus, the purpose of this study is to consider both the positive and negative characteristics of the legal family.

METHODS

This study employed a range of modern methodological approaches to comprehensively examine the research subject and object. These approaches are selected based on their relevance and effectiveness in achieving the research objectives.

The dialectical method was employed to understand the general laws of the development of legal systems. By applying this method, we recognized the dynamic and evolving nature of legal systems, which helped us to contextualize the formation and functioning of mixed legal systems.

The historical method played a crucial role in tracing the historical and cultural development of specific countries and regions. This method enabled us to identify the historical factors that influenced the emergence and evolution of mixed legal systems, providing valuable insights into their context and background.

The comparative law method was instrumental in conducting a thorough examination of various elements within legal families and systems. Through comparisons, we identified the distinct characteristics, strengths, and weaknesses of mixed legal systems, shedding light on their coexistence and interaction.

The formal legal method was utilized to conduct a qualitative analysis of the phenomenon under study. This method allowed for a detailed examination of the elements and structures of mixed legal systems, including sources of law, legal techniques, and other relevant aspects. Such analysis provided a deeper understanding of how mixed legal systems are organized and function.

By employing these methods, this study achieved its objectives of comprehensively exploring the features, classification, and practical implications of mixed legal systems.

RESULTS

Both the classics and their followers laid down various criteria as the basis for the classification of legal families and systems. Thus, the French jurist R. David, who



was the first to propose classifying the existing legal families within the so-called trichotomy: Romano-Germanic, Anglo-Saxon (the author calls it common law), and socialist legal families with the addition of religious and traditional legal families. Thus, such a classification is based on ideology and legal techniques. In the first case, David assigns an important role to the philosophical and religious base, as well as to the socio-economic structure. According to David, the basis for attributing a legal system to a legal family depends on the methods of legal work, methods of creating, systematizing, and interpreting legal norms, a set of sources of law, and a legal dictionary. Subsequently, David supplemented his classification by highlighting the following:

- Western legal families including the Romano-Germanic family and the family of common law. These legal families are based on the principles of the capitalist approach to the economy, liberalism in politics, and Christianity.

- The family of socialist law based on the socialist principles of building the economy, politics, philosophy, and morality.

- The religious legal family including the Muslim, Hindu, and Jewish legal systems. All of them are fundamentally different from both Western and socialist ones. David notes that he refrains from the polemics of positivists and supporters of natural law.

- The Far Eastern legal family, within which the Chinese and Japanese legal systems can be distinguished. Unlike previous legal families, the individual's desire for peace and harmony has historically developed in the legal systems of this family, not supported by legal norms. This does not mean that the residents of China or Japan have a negative attitude to these norms, but any decent citizen is not obliged to treat them as a symbol of justice. David notes that despite the westernization of Japan and the influence of socialist law on Chinese law, the emergence of positive law in these legal systems, the attitude to the law, as well as to those who study and apply it, has not changed much over centuries.

- The legal family of Tropical Africa and Madagascar (the traditional legal family) close to those described in the previous paragraph, since traditions continue to play a huge role in the legal life of society (David & Brierley, 1985).

Thus, David presents a more expanded version of the division of legal families in his expanded classification but still does not consider many other criteria for their classification.

Naturally, this classification could not remain the only one. Thus, the second direction in the classification was headed by the German comparativist K. Zweigert. Zweigert based the classification not on his original idea, but on the one developed by several scholars who published their work "The Comparative Public Law Treatise" in 1950 (Armijon et al., 1950).

Zweigert proposes the style of law, which includes a historical element as the most important criterion for delimiting legal families – the origin and development of the legal system; features of legal thinking in the country; institutions of law inherent in the legal system; features of sources of law and techniques, rules, means, and types of interpretation of law; as well as the ideological component (Saidov, 2003).

As a result, Zweigert concludes the need to distinguish eight legal circles based on the styles of law: Roman, German, Scandinavian, Anglo-American, socialist, Far Eastern, Islamic, and Hindu. These legal systems, united in legal circles, can be grouped into two large categories: religious and non-religious legal families. The first category includes the Islamic and Hindu legal families, and the second category consists of two subcategories: Western and non-Western law. Western law includes Roman legal systems, including European continental (except German and Scandinavian) and Latin American legal systems; German legal systems; Scandinavian legal systems; Anglo-American legal systems. The subcategory of non-Western legal systems includes Far Eastern legal systems and the socialist legal family.

Zweigert and H. Kötz (1969) identify mixed legal families within the framework of the Western legal category represented by hybrid legal systems – Roman, Germanic, and Anglo-American.

David also wrote about such interweaving of legal systems, directly pointing out that while developing, legal families cannot but interact. Such interaction has repeatedly occurred in history between the common law family and the Romano-Germanic family. For example, the development of both families was influenced by Christianity. One of the systems of law throughout the centuries was the canonical one, which, in general, was common to the countries of both the Romano-Germanic legal

family and common law. Later, with the development of liberal ideology, many of its elements were equally borrowed by both the Romano-Germanic legal family and the common law family, which can be seen in several documents of revolutions (for example, in England and France).

David notes the mixed nature of the law in Scotland, Israel, South Africa, the Philippines, as well as the Canadian province of Quebec.

It is no coincidence that we began our consideration of mixed legal families with historically established scientific approaches. At present, the legal systems in various countries and, accordingly, the legal families are in a different state than when they were analyzed.

Thus, many scholars in recent decades have clearly distinguished the mixed (hybrid) legal family, in particular, M. Mattar, V.V. Palmer (2015), J. Plessis (2019), etc.

We agree with Palmer's statement that the existence of such legal systems has been considered for decades as nothing more than a deviation or delusion, as a result of which the topic was hushed up in the scientific world. The main emphasis in research was made on Western legal families, and the tools for studying mixed legal systems were not developed (Palmer, 2013). The existence of such legal systems became a reality for both researchers and legal practitioners. If one delves deeply into the study of legal systems existing in the modern world, then, according to Palmer, two types of mixed legal systems can be distinguished: the classical type of mixed jurisdictions and the pluralistic type (Palmer, 2008).

The former originated earlier and is based on a long history of interaction between two main legal families – the Romano-Germanic family and common law.

The pluralistic type of mixed legal systems developed based on the idea of legal pluralism or polyjuridism, which, in turn, has its roots in the struggle against colonialism. Even in the colonial era, the peoples living under the rule of Western empires, despite their legal expansion, continued to use their achievements in the legal sphere, largely inherited from their ancestors. This refers to the legal customs, unofficial law, which has remained outside the influence of state law. Upon reaching independence, it was necessary to solve the complex issue of combining the introduced law in one legal system – the heritage of the former metropolis.

Due to the idea of right-wing pluralism, mixed legal systems began to form in the former colonies, primarily in Africa and Oceania.



Researchers distinguish many different types of modern mixed legal systems including (Mariani & Fuentes, 2000):

- Mixed model of continental and common law;
- Mixed model of continental and customary law;
- Mixed model of continental and Muslim law;
- Two mixed models of continental, common, and customary law;
- Mixed model of common and Muslim law;
- Mixed model of common and customary law;
- Mixed model of general, Muslim, and customary law;
- Mixed model of general, Muslim, and continental law;
- Mixed model of Jewish, common, and continental law.

Such classifications are conditional. There are also disadvantages, in particular, the socialist legal family remains without attention. It had an impact not only on modern and previously existing socialist states but also on the development of the law in many countries. It was in Soviet Russia in 1917 that an eight-hour working day was established at the legislative level for the first time in history. A year later the right to annual paid leave was secured and much more, which was later borrowed by the legal systems of advanced countries.

In the classification, states with a less significant interpenetration of legal families and systems, for example, Saudi Arabia, are described as mixed systems. This considers the mixed nature of the law of Israel, the legal system of which forms a separate model. However, Hindu law is not mentioned, and India is in the group of a mixed model of common, Muslim, and customary law (it is assumed that Hindu law is attributed to customary law, but, in our opinion, this is not entirely fair).

The task of practical implementation of the successful functioning of a mixed legal system has no unambiguous solution. In one case, elements of one legal family are borrowed into another. For example, the institution of judicial precedent, which is not the most popular in the Romano-Germanic legal family, nevertheless gradually takes its place, primarily due to European supranational judicial structures. In other cases, there is a real coexistence of two or more legal systems. This often happens in the States of Oceania, where, for example, many institutions of family law are regulated by customary law, and there is no interference from Western legal systems in these areas.

The state legal system, and law as a whole, is not a static phenomenon. Historically, it has been proven that it develops progressively and dynamically,

somewhere evolutionarily and somewhere revolutionary. Much of the development of legal systems depends on circumstances, external influence (both positive and threats), and cultural and historical processes. Thus, even Roman law, which laid the foundation of the Romano-Germanic legal family, was not monotonous throughout its history. One can see the cardinal changes that Roman law experienced in its development considering the stages of development of Roman law during the existence of the Roman Kingdom, Republic, and Empire and the fall of the western empire. However, the law was revived, received by several European states, and again transformed after the fall of Rome, including its Eastern part.

We believe that further interpenetration of legal systems and legal families should be expected in the future. This is due to many factors. Firstly, it should be remembered that despite the deglobalization processes in the world that took root during the coronavirus pandemic, legal globalization continues.

We consider it appropriate to cite the opinion expressed by I. Castellucci regarding the future of mixed legal systems. Thus, according to Castellucci's point of view, the system of Anglo-Saxon law in the future may acquire elements of Muslim, Chinese, or continental law, which means that there will be a mixture of legal traditions (Castellucci, 2008). One will have to discard many components of legal systems and families, in particular, cultural, civilizational, linguistic, and other legacies.

CONCLUSION

Summing up this study, we consider it important to note several key conclusions.

Firstly, there has been an increasing interest in the study of mixed legal systems (families) in recent years. While earlier leading scholars denied the existence of such legal families, the concept gradually began to be introduced into scientific circulation. At present, the existence of such a family is undoubted.

Secondly, mixed legal systems are heterogeneous and can be classified. Up to a dozen such systems are distinguished in scientific research.

Thirdly, mixed legal systems have their advantages and disadvantages. Some researchers call the loss of purity of legal families among the disadvantages. We believe that a pure legal family cannot exist a priori. Many of them are intersected and interconnected.

Legal systems built based on legal pluralism and having a mixed character have shown their viability in countries that have freed themselves from the colonial oppression of Western empires. The mixed system helped them both preserve their historical heritage and use the achievements of Western legal families.

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